

AB

16. The method of making a cosmetic emulsion comprising the steps of adding a gelling sufficient amount of a non-siloxane based polyamide resin to at least one non-aqueous phase, and dispersing an aqueous phase with the non-aqueous phase, at least one alkylene oxide containing emulsion stabilizer, and a colorant component present in an amount greater than about 2.0 percent.

### REMARKS

#### The Examiner's Rejection under 35 U.S.C. §103

The Examiner rejects Claims 1 to 22 under 35 U.S.C. §103 as being unpatentable over Ross et al. in view of Tsubaki et al. Specifically, the Examiner alleges that

Ross et al. teach the use of a cosmetic composition and method comprising a polyamide gelling agent (2-40%), an antiperspirant active ingredient and a solvent system wherein a combination of a polar solvent (water) and a non-ionic surfactant (5-30%) act as a dispersing medium to form an emulsion. . . . Ross et al. are deficient [ ] in that they do not expressly teach an alkylene oxide stabilizer in their formulation.

Tsubaki et al. teach the use of cosmetic formulations comprising an alkylene oxide . . . Therefore it would have been obvious to one of ordinary skill in the cosmetic art at the time the invention was made to use alkylene oxide . . . with the expected result of obtaining a smooth and durable cosmetic composition for the skin.

There is no criticality seen in the instantly claimed terminal end group of the polyamide resin since the polyamide functions as a gelling agent in the formulation. The burden is shifted to the Applicant to show some criticality in the specified terminal end group.

#### Failure to Teach or Suggest All Claim Limitations

Pursuant to 35 U.S.C. §103, establishment of a *prima facie* case of obviousness requires, *inter alia*, that prior art reference(s) teach or suggest all the claim limitations. *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974). Upon review of the cited references described below, it will be seen that the references cited by the Examiner do not teach or suggest all of the claim limitations of the present invention, as amended, and thus, that a *prima facie* case of obviousness is not made.

The present invention, as amended, is a stable emulsion comprising at least one non-siloxane based polyamide resin as a gelling agent in the oil phase with a C<sub>1-5</sub> alkylene oxide containing emulsion stabilizer. Support for this amendment is found in the present specification at page 4, [0008], and page 5, [0010]. No new matter is added. The color cosmetic emulsion is

particularly challenging to stabilize because the polyamide is very polar and tends to be too tacky to support the pigments stably. The Ross reference is the primary reference cited by the Examiner, and it relates to a clear or translucent composition comprising an antiperspirant active. The solvent system is described at column 4, lines 5 to 25, as being capable of dissolving the polyamide, and comprises water and a non-ionic surfactant. The Examiner notes that it fails to teach an alkylene oxide stabilizer. However, in addition, the Ross reference also fails to disclose a polyamide gelling agent in the oil phase of a stable emulsion containing the emulsion stabilizer. The Tsubaki reference, in combination with the primary reference, also fails to teach or suggest the claims of the present invention, as amended.

The Tsubaki reference relates to a cosmetic formulation comprising a particular non-hydrolyzing block copolymer. At column 5, lines 46 to 61, surface active agents are disclosed as being useful for the products containing the block copolymer. Thus, the Tsubaki reference fails to teach or suggest a polyamide resin as a gelling agent. However, the Tsubaki reference fails to teach or suggest that the surface active agents described therein have any effect in stabilizing an emulsion containing the polyamide as the gelling agent. Therefore, one of ordinary skill in the art would not be motivated to use the surface active agents of the Tsubaki reference in the Ross compositions. Surface active agents tend to be drying, and therefore, it would not be expected by one of ordinary skill in the art to produce a smooth and durable cosmetic for the skin by using the surface active agents taught in the Tsubaki reference. Finally, the Tsubaki reference fails to remedy the defect of the Ross reference in that there is no teaching or suggestion of using the polyamide resin in the oil phase.

The Examiner finally notes that there is no criticality seen with the particular terminal end group of the polyamide resin. However, as a *prima facie* case of obviousness has not been made, a requirement of showing criticality is premature. The burden of proof only shifts to Applicants, and Applicants are only required to make a showing of criticality, if a *prima facie* case of obviousness is made as, for example, when ranges overlap or lie inside ranges disclosed by the prior art, the claims may be patentable if the applicant can show criticality in the claimed

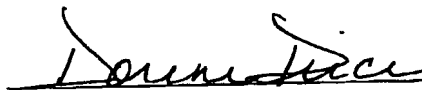
range by evidence of unexpected results. *In re Wertheim*, 191 USPQ 90, 100 (CCPA 1976). However, even if a case of *prima facie* obviousness can be made, the claims of the present invention are still patentable under 35 U.S.C. §103 because the results achieved by the present invention were unexpected. As noted in the present specification, it is surprising to find that a stable emulsion comprising a polyamide resin as the gelling agent can be achieved. The non-siloxane based polyamides are known to be tacky and make the challenge of using them to gel an emulsion that much more difficult. But with the presence of an alkylene oxide containing emulsion stabilizer, it has been surprisingly found that the emulsion gelled with the non-siloxane based polyamide is stable. Taking into consideration the temperature sensitivity of the ethylene oxide containing surfactant that can result in stability problems, the stable emulsions of the present invention are achieved contrary to expectations. Neither the combination of the non-siloxane based polyamide resin with the alkylene oxide containing emulsion stabilizer, nor the presence of the polyamide in the oil phase, nor the unexpected results derived therefrom, are taught or suggested by the combination of the Ross and the Tsubaki references. For the reasons stated above, Applicants, therefore, request that the Examiner's rejection be withdrawn as Claims 1 to 22 of the present application satisfy the requirements of 35 U.S.C. §103(a).

#### CONCLUSION

In view of the arguments presented above in the present submission, the claims are believed to be in condition for allowance, and issuance of a Notice of Allowance is respectfully solicited.

Respectfully submitted,

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**MARKED AMENDMENTS.**

1. A cosmetic composition comprising an emulsion of an aqueous phase and a non-aqueous phase, and a gelling system of at least one alkylene oxide containing [an] emulsion stabilizer and at least one non-siloxane based polyamide resin present in the non-aqueous phase.

14. A stable cosmetic emulsion comprising a colorant component present in an amount greater than about 2.0 percent by weight of the composition, an aqueous phase, and an oil phase wherein the aqueous phase contains at least a gelling sufficient amount of at least one non-siloxane based polyamide resin having a terminal end group selected from the group consisting of amine, acid, and ester present in the non-aqueous phase, and at least one ethylene oxide containing surfactant having an HLB greater than 8.

16. The method of making a cosmetic emulsion comprising the steps of adding a gelling sufficient amount of a non-siloxane based polyamide resin to at least [an] one non-aqueous phase, and dispersing [the] an aqueous phase with [a] the non-aqueous phase, at least one alkylene oxide containing emulsion stabilizer, and a colorant component present in an amount greater than about 2.0 percent.